No. 77-1173

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In the Supreme Court of the United States

OCTOBER TERM, 1977

TRINITY TRUCKING & MATERIALS CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A47-A52) is reported at 567 F. 2d 391. The decision and order of the National Labor Relations Board (Pet. App. A14-A22) are reported at 221 NLRB 364. The supplemental decision and order of the National Labor Relations Board (Pet. App. A23-A46) are reported at 227 NLRB 792.

JURISDICTION

The judgment of the court of appeals (Pet. App. A56) was entered on January 17, 1978. The petition for a writ of certiorari was filed on February 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(1) of the National Labor Relations Act by discharging three employees who filed a civil suit against the Company and the firm for which it is a subcontractor, claiming compensatory and punitive damages for breach of a collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. App. A1.

STATEMENT

1. Petitioner (herein "the Company"), a hauler of construction materials, had a collective bargaining agreement with the Union.[1] The Company did most of its hauling on subcontracts for Wabash Valley Asphalt Company (herein "Wabash"), which was a party to a statewide collective bargaining agreement with the Indiana Conference of Teamsters (herein "the Red Book contract"). The Red Book contract provided for higher wage rates than did the Company's contract with the Union. It also provided that its terms would be applicable to subcontracts of covered employers insofar as the subcontractors engaged in hauling materials for highways or heavy construction jobs covered by the agreement. (Pet. App. A26-A27.)

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[1]Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

In late 1972, a dispute arose over the rates for jobs performed by the Company as a Wabash subcontractor. Led by employee Lloyd Joy, the Union insisted that the Company pay Red Book rates rather than the rates it was obligated to pay under the Union contract. At one point, Joy advocated a strike to "shut down" the Company and force it to pay Red Book rates (Pet. App. A28-A29, A33).[2] The Company orally agreed to pay Red Book rates for Wabash jobs on Indiana state highways, but failed to do so (Pet. App. A28). When Joy filed grievances under the contract grievance procedure based on this failure, the Company agreed to pay Red Book rates only for the 15 days prior to the filing of each grievance, relying on a provision of the Red Book contract which required grievances to be filed within 15 days of their occurrence (Pet. App. A49).

Faced with the prospect of having to file an individual grievance each time the Company failed to pay the appropriate rates, Joy, with fellow employees Wallace Simmons and Jack Gibbens, consulted an attorney. On his advice, they filed a civil suit against the Company and Wabash for breach of the Red Book contract, claiming compensatory damages of $40,000 and punitive damages of $200,000 (Pet. App. A29). The Company demanded that the three employees withdraw their claims for punitive damages and warned that, if they did not do so within 48 hours, they would be discharged for "insubordination and extreme disloyalty." They refused to comply and were discharged (Pet. App. A30-A32).

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[2]The Administrative Law Judge did not credit the testimony of Company witnesses that Joy stated that he wanted to put the Company out of business (Pet. App. A32-A33, A37).

2. The Board, adopting the decision of its Administrative Law Judge (ALJ), found that the employees' action in filing the civil suit was protected by Section 7 of the Act and therefore the Company violated Section 8(a)(1) of the Act by discharging them for such activity (Pet. App. A39-A40, A45-A46).[3] The ALJ applied the principle enunciated in *Leviton Manufacturing Co., Inc.*, 203 NLRB 309, enforcement denied on other grounds, 486 F. 2d 686 (C.A. 1), that "the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith" (Pet. App. A18).

Thus, the ALJ concluded that the Company had not proved the filing of the suit was motivated by malice or bad faith. He found that the employees "filed their lawsuit upon the advice of their attorney based, as shown by an examination of the attendant pleadings, on an arguable legal theory" (Pet. App. A38-A39), and that, in the circumstances presented, neither their bypassing of the grievance procedure,[4] Joy's earlier desire to "shut down" the Company, the joinder of Wabash, nor the claim for punitive damages amounted to malice or bad faith (Pet. App. A36-A39).

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[3]The three employees had filed grievances concerning their discharges, and the discharges were ultimately upheld by an arbitrator who found that the employees were discharged for "just cause" (Pet. App. A2-A13). The Board refused to defer to the arbitrator's award, finding it repugnant to the policies of the Act since the arbitrator had failed to recognize "the governing principle of law" which established "the right of employees to sue their employer in a civil action" (Pet. App. A18-A19). No issue concerning the propriety of this Board holding is raised by the petition.

[4]The ALJ noted that the employees bypassed the grievance procedure because the Company's position in the previous grievances led them to believe that they could not recover by that route the back wages to which they considered themselves entitled (Pet. App. A36).

The Board ordered the Company, *inter alia*, to offer the three employees reinstatement to their former positions, and to compensate them for any loss of earnings (Pet. App. A41).

3. The court of appeals upheld the Board's decision and enforced its order. The court agreed with the Board that filing a civil damage action against the employer is concerted activity protected by Section 7 of the Act unless the employees acted in bad faith (Pet. App. A50), and it agreed that bad faith had not been shown here.

The court rejected the Company's contention that the plea for punitive damages constituted bad faith (Pet. App. A51):

> Given the barriers to recovery resulting from Trinity's 15-day limit on payments, the employees' request for punitive damages, which was filed on the advice of counsel, was based on facts arguably similar to those that other litigants in the state, and later the Indiana courts, determined to be sufficient to justify an award of punitive damages. * * * Particularly in this context, Trinity's view that the request for punitive damages by itself should prove bad faith would take away the full panoply of legal remedies given by *Leviton* in precisely the cases in which civil litigation has the most to offer in comparison with filing charges with the Board.

The court also rejected the Company's contention that the employees should have utilized the grievance procedure rather than filing suit. It noted that, given the Company's position on the grievance procedure limitations period, the employees would have had to file grievances weekly or bimonthly in order to recover the sums they considered to be due them (Pet. App. A51). The court added that, "since the lawsuit was based on a

contract between Wabash and an affiliated union (Indiana Conference of Teamsters) arguably binding Trinity as a subcontractor of Wabash," it was "essential to join Wabash to avoid the inevitable defense that a necessary party had been omitted as a defendant" (Pet. App. A51, A53). Finally, the court agreed with the Board that Joy's remarks did not evidence an intention "to injure Trinity or to destroy its relationship with Wabash," but only his "increasing irritation and frustration over Trinity's failure to pay the Red Book rates, and his desire to force [it] to pay what Joy believed was lawfully owed to him and his fellow employees" (Pet. App. A52).

ARGUMENT

The decision of the court of appeals is correct and there is no conflict among the circuits or other reason for review by this Court.

The courts of appeals that have ruled on the question have agreed with the Board that, unless filed in bad faith, a labor-related civil action by a group of employees is a concerted activity protected by Section 7 of the Act.[5]

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[5]The cases upon which petitioner relies for the assertion that there is a conflict in the circuits (Pet. 11-12, n. 9) are inapposite. None of those cases involved the filing of a civil suit. *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, involved the question whether employees who distributed to the public leaflets which disparaged the company's product and business policies and were not related to any labor dispute could be discharged for "disloyalty" to the employer. *Boeing Airplane Co.* v. *National Labor Relations Board*, 238 F. 2d 188 (C.A. 9), involved the discharge of an employee who, in his capacity as an employment agent, solicited his fellow employees to leave the company's employment and seek jobs elsewhere. *National Labor Relations Board* v. *Red Top, Inc.*, 455 F. 2d 721, 727-728 (C.A. 8), involved the discharge of employees who, because they were unhappy about a demanding supervisor, "were insolent, insubordinate and intimidating [and who] utilized false charges, threats of physical violence and threats of activity detrimental to the welfare of the business operation" (*i.e.*, involving their employer's customer, the hospital at which they worked as cleaning crew, in their dispute). *National Labor Relations Board* v. *Knuth Bros., Inc.*, 544 F. 2d 320 (C.A. 7), involved the discharge of an employee for releasing confidential information obtained in the course of his employment which damaged his employer's relationship with an important customer.

Leviton Manufacturing Co., Inc. v. *National Labor Relations Board*, 486 F. 2d 686, 689 (C.A. 1); *Altex Ready Mixed Concrete Corp.* v. *National Labor Relations Board*, 542 F. 2d 295, 297 (C.A. 5). Cf. *Socony Mobil Oil Co.* v. *National Labor Relations Board*, 357 F. 2d 662, 663-664 (C.A. 2); *Walls Manufacturing Company* v. *National Labor Relations Board*, 321 F. 2d 753 (C.A. D.C.), certiorari denied, 375 U.S. 923. The Board found, and the court below sustained its finding, that the employees here did not file the suit in bad faith, and that therefore the Company violated Section 8(a)(1) of the Act by discharging them for filing it.

Petitioner challenges the Board's conclusion on two grounds: (1) to accord the protection of Section 7 of the Act to employees who have filed suit without exhausting contract grievance procedures is contrary to the policy favoring exhaustion of those procedures (Pet. 7-10); (2) irrespective of the employees' good faith, their action in requesting, and maintaining their request for, substantial punitive damages against the Company and in joining the Company's primary customer (Wabash) in the suit, and the statement of "ringleader" Joy that he would close down the Company, established sufficient "disloyalty" to warrant the Company in discharging the employees (Pet. 10-13). There is no merit to either of these contentions.

First, even if the lawsuit here raised issues which should first have been submitted to the contractual grievance machinery, this in itself would justify only judicial abstention, not forfeiture of rights guaranteed by Section 7. The right under Section 7 to pursue a civil claim does not depend on the ultimate validity of the claim.[6] In any event, as the court below noted (p. 5, *supra*), pursuit of the grievance machinery could not be expected to secure satisfaction of the employees' claims, given the Company's interpretation of the grievance clause limitation period.

Second, petitioner's contention that the request for punitive damages amounts to disloyalty rests on the premise that this plea, if effective, would result in serious economic damage to the employer.[7] However, as the court below pointed out (p. 5, *supra*), acceptance of that argument would deprive the employees of recourse to "the full panoply of legal remedies" available to them.[8]

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[6]See *National Labor Relations Board* v. *John Langenbacher Co.*, 398 F. 2d 459, 463 (C.A. 2), certiorari denied, 393 U.S. 1049; *National Labor Relations Board* v. *Ben Pekin Corporation*, 452 F. 2d 205, 206 (C.A. 7); *National Labor Relations Board* v. *H. C. Smith Construction Co.*, 439 F. 2d 1064 (C.A. 9).

[7]Respecting the joinder of Wabash, petitioner never requested the employees to release Wabash as a defendant; their retention by the Company was conditioned solely upon withdrawal of the punitive damage claim. And the ALJ declined to credit the testimony of Company witnesses that Joy threatened to drive the Company out of business (n. 2, *supra*).

[8]As the court added, the punitive damage award arguably was authorized by state law and was filed on advice of counsel (Pet. App. A51). Contrary to petitioner's contention (Pet. 13-14), the court did not hold that action on advice of counsel protects conduct which otherwise would be unprotected. The court merely assessed that fact as one element in determining whether the employees acted in bad faith in seeking punitive damages and joining Wabash in the suit.

The cases relied upon by petitioner (n. 5, *supra*), relating to the duty of loyalty owed by employees to their employer, require no such result. Those cases stand for the proposition that the employer is entitled to demand faithful service from its employees and therefore the employees cannot use the employment relationship to disparage their employer. The employees here did not disparage their employer simply because they sought a remedy to which they reasonably believed they were entitled. Petitioner does not allege that the gravamen of the suit maligned it or misrepresented the character of the dispute. Its assertion that it would be injured financially if the employees were successful stands on no firmer footing than would an assertion that strike activity is disloyal to the employer because it injures its business.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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